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IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON

JOSEPH J. HESKETH III,
*on his behalf and on behalf of other similarly
situated persons,*

Plaintiff,

v.

TOTAL RENAL CARE, INC.,
*on its own behalf and on behalf of other
similarly situated persons,*

Defendants.

Case No: 2:20-cv-01733-JLR

SECOND AMENDED CLASS ACTION
COMPLAINT

(JURY DEMAND)

Plaintiff, Joseph J. Hesketh III, individually and on behalf of all other similarly situated,
sues Defendant, Total Renal Care, Inc. ("Total") individually and on behalf of all others
similarly situated, and alleges:

I. OVERVIEW

1. An employee has the right to be paid for the time the employee does work for an
employer at the rates to which the parties have agreed. This action is filed because the

1 Defendant and others failed to pay the Plaintiff and the other class members the amounts they
2 were due to be paid for the work they performed and which the Defendants agreed to pay.

3 2. Total is an integral part of DaVita, Inc. (“DaVita”) (formerly known as Total
4 Renal Care Holdings, Inc.) DaVita is a nationwide entity that employs 56,793 people in the
5 United States to operate its profit driven business model through a number of entities controlled
6 and operated by DaVita.

7 3. Internally, DaVita treats 30 of its subsidiaries, including Total, as a “whole”
8 without distinction between DaVita and Total or the other entities operating under DaVita’s
9 umbrella. There is a single payroll system and pay practices utilized to administer payroll and
10 issues relating to the compensation of its employees.

11 4. Employees of Total and the other entities found under the DaVita umbrella are
12 led to believe that they all part of a single “village” down to including the registered
13 trademark of DaVita on their paychecks. The impact of the single village mantra is exemplified
14 by the fact that some managerial level employees are unsure what subsidiary actually employs
15 them.

16 5. DaVita describes itself as an entity that “...provide[s] dialysis and administrative
17 services and related laboratory services throughout the U.S. via a network of 2,753 outpatient
18 dialysis centers in 46 states and the District of Columbia.¹

19 6. As of December 31, 2019, DaVita operated or provided administrative services
20 through a network of 2,753 outpatient dialysis centers in the U.S.² This includes 53 locations in
21 Washington State.

22 7. Plaintiff is an employee of Total and a member of the DaVita village and began
23 working for Total over thirteen (13) years ago.

24
25 ¹ See DaVita, Inc.’s 2019 10k available at
26 <https://www.sec.gov/ix?doc=/Archives/edgar/data/927066/000092706620000014/dva-12311910k.htm#s967C77CBE804541FAE5B78B764C16026>

² *Id.*

1 8. DaVita encourages the employees of Total and the other entities under the
2 DaVita umbrella to believe that DaVita is a village community and repeatedly tells its
3 employees that it lives by “We said. We did.” That is often repeated in various ways to its
4 employees to confirm that if DaVita says something to its employees, they can impose trust and
5 confidence that DaVita will do what it says.

6 9. DaVita maintains and publishes an employee handbook titled “Teammate
7 Policies” which contains the conditions of employment; the handbook states what is expected of
8 DaVita employees.

9 10. DaVita distributes the handbook through its StarLearning program, which is set
10 forth as an educational system devised by DaVita to enhance its employees’ knowledge.
11 Nowhere does the StarLearning system advise or even suggest that it is a system for an
12 employee to waive or relinquish their rights. In light of this and the often repeated “We said.
13 We did,” or similar variations, there is no reason for an employee to suspect that participating in
14 StarLearning will reduce their rights in any way.

15 11. To the extent that DaVita claims that any statement by its employees—the
16 overwhelming majority of which have no legal training, knowledge or experience as to whether
17 or not something amounts to a contract, express or implied—is unreasonable, it is a narrow and
18 myopic view that is overwhelmed by the overall relationship which includes statements that its
19 employees can repose trust and confidence in DaVita.

20 12. Also, the Plaintiff, like the other members of the proposed class, is directed to
21 acknowledge the various provisions that are no doubt prepared by lawyers for DaVita and
22 presented by DaVita on a take-it-or-leave-it basis without any opportunity for any employee to
23 negotiate any term. The prepared provisions set forth legal conclusions when DaVita knows its
24 employees, like Plaintiff, lack sufficient legal training, knowledge or experience to understand
25 the legal meaning or legal effect of provisions they are asked to sign. If anything, DaVita’s
26 efforts to have their employees sign provisions that suggest they are waiving any rights

1 confirms DaVita's consciousness that its employees rely on the policies offered as part of their
2 terms of employment, as they should.

3 13. DaVita is able to identify each employee who has submitted an acknowledgment
4 that they have read and understood the policies set forth in the Teammates Handbook. DaVita is
5 also able to identify and list any employees who have not submitted an acknowledgment that
6 they have read and understood the policies.

7 14. The Teammates Handbook is not designed to alter the "at will" employment
8 status of Mr. Hesketh or the similarly situated members of the Putative Class that Mr. Hesketh
9 seeks to represent, in the sense that it does not guarantee TRC employees that they will be
10 employed for a term of employment.

11 15. The Teammates Handbook does, however, by its very terms inform the TRC
12 employees that the Teammate Policies "set forth the entire arrangement between [the employee]
13 and DaVita" and that the employee is "governed" by the Teammate Policies found in the
14 Teammate Handbook, the Code of Conduct and the DaVita Compliance Program.

15 16. Specifically, each employee of TRC and DaVita is required to sign a "Teammate
16 Acknowledgment" and "Teammate Attestation" annually that includes the following:

17 As a DaVita teammate, I understand ***I am expected to read, understand and adhere to***
18 ***our Company's policies.*** I will familiarize myself with the material in the Teammate
19 Policies, the Code of Conduct and the DaVita Compliance Program, as well as any
changes to them.

20***I understand that I am governed by the contents of the Teammate Policies,***
21 ***the Code of Conduct and the DaVita Compliance Program,*** and I recognize that
22 DaVita reserves the right to interpret, amend, modify, supersede or eliminate policies,
practices or benefits (except at employment at will policies) described in these policies
from time-to-time in its sole and absolute discretion. No oral amendment to any policy
or benefit described herein shall be effective.

23 I understand that the Teammate Policies, the Code of Conduct and the DaVita
24 Compliance Program and their contents are not intended to create any contractual or
25 legal obligations, express or implied, between DaVita and its teammates; however, ***these***
policies do set forth the entire employment arrangement between me and DaVita with
respect to the at-will nature of my employment relationship with DaVita.....

26 17. Thus, while the "contents of the Teammate Policies, the Code of Conduct and
the DaVita Compliance Program" do not alter the at will employment status of non-exempt

1 TRC or DaVita employee, by its very words the acknowledgement tells that employee that the
 2 “contents of the Teammate Policies, the Code of Conduct and the DaVita Compliance Program”
 3 “set forth the entire employment arrangement between [the employee] and DaVita” and that the
 4 employee must “read, understand and adhere to” the Teammate Policies found in the Teammate
 5 Handbook, the Code of Conduct and the DaVita Compliance Program because the employee is
 6 “governed” by those policies.

7 18. Every year, every employee of TRC and DaVita is required to read a “Teammate
 8 Policies Update” that contains changes to the Teammate Policies for the past year and again
 9 acknowledge that the employee has “read, understand[s] and adhere[s] to our Company's
 10 policies. I will familiarize myself with the material in the Teammate Policies, the Code of
 11 Conduct and the DaVita Compliance Program, as well as any changes to them.”

12 19. After the employee finishes the “Teammate Policies Update” each employee
 13 must again acknowledge that the employee understands that he or she is “governed by the
 14 contents of the Teammate Policies, the Code of Conduct and the DaVita Compliance Program,”
 15 that these “policies do set forth the entire employment arrangement between me and DaVita
 16 with respect to the at-will nature of my employment relationship,” that his or her employment
 17 with employment with DaVita has “no specific term and is at the mutual consent of myself and
 18 DaVita,” and that “either DaVita or I can terminate my employment relationship at any time,
 19 with or without cause, with or without notice.”

20 20. Through these annual acknowledgements and other documents and programs
 21 that make up the carefully formulated corporate culture of DaVita, Mr. Hesketh and the
 22 members of the putative class are taught that the specific terms of their employment (the “entire
 23 employment arrangement”) is found in the “contents of the Teammate Policies, the Code of
 24 Conduct and the DaVita Compliance Program” and that DaVita may change the “contents of the
 25 Teammate Policies, the Code of Conduct and the DaVita Compliance Program” and thereby
 26 changed the specific terms of its employee’s employment (the “entire employment
 arrangement”).

1 21. In informing its employees that “the[] policies [] set forth the entire employment
2 arrangement between [employee] and DaVita with respect to the at-will nature of my
3 employment relationship with DaVita,” Defendant informs its employees that its policies,
4 including the policies found in the Teammate Policies, are terms of the employees employment
5 making the preceding admonition that the policies are not intended to “create any contractual or
6 legal obligation[]” inherently ambiguous and at best confusing. Moreover, employees were
7 bound by the Teammate Policies and relied on corporate culture and management directives to
8 conclude that Defendant was bound by the obligations that it set forth in the Teammate Policies,
9 the Code of Conduct and the DaVita Compliance Program.

10 22. Defendant, for reasons that had to do with defendant’s own self-interests, created
11 an environment in which defendant’s employee were led to believes that the Teammate Policies,
12 the Code of Conduct and the DaVita Compliance Program purport to be fair, and would be
13 applied consistently and uniformly to each employee.

14 23. Managerial employees acknowledge that the Teammates Handbook creates
15 mutual expectations between the employees and DaVita that the policies will be applied to their
16 relationship.

17 24. “Integrity” is also ingrained in DaVita’s corporate culture, and as with other
18 corporate mission statements, is pervasive. It is known as: “We say, what we believe, and we do
19 what we say. We are trusted because we are trustworthy. In our personal, team, and
20 organizational values, we strive for alignment in what we say and do.”

21 25. Defendant created an atmosphere where its at will employees are expected to
22 abide by the Teammate Policies, the Code of Conduct and the DaVita Compliance Program and
23 where employees made to believe that Total will abide by those same policies during the period
24 that they are employed.

25 26. When considering the above statements in the context of repeated
26 communications in writing and at corporate meetings with DaVita’s management to its
employees that they can trust it, any effort by DaVita to disclaim that it does not owe the

1 benefits set forth in the Teammates Policies handbook is not credible and the repeated
2 statements negate any disclaimers.

3 27. There is no doubt that the Plaintiff, like the other members of the proposed class,
4 expected fair treatment from DaVita, with promises as outlined in the Teammate Policies
5 handbook to remain on the job at Total and to not seek employment elsewhere.

6 28. Under the Compensation section, the handbook includes a “Disaster Relief
7 Policy” that sets out DaVita’s pay practices for non-exempt employees during a “declared
8 emergency or natural disaster.”

9 29. Management personnel of TRC’s expect both at will employees and management
10 employees to be familiar with, rely upon and follow (be “governed by”) the policies in the
11 Teammates handbook.

12 30. Section 4 of the Teammate Policies and Procedures Handbook titled “Pay
13 Practices,” true to its name, contains TRC and DaVita’s “pay practices” arrangement with its at
14 will employees.

15 31. It is TRC and DaVita’s declared and actual policy that the provision of its Pay
16 Practices, Section 4 of the DaVita Teammate Handbook is part of its employment contract with
17 its at will employees and is enforceable by those employees as part of their “employment
18 arrangement” with TRC and DaVita.

19 32. Neither TRC nor DaVita reserve to themselves the right to “renege” on its Pay
20 Practices retroactively after work has been performed, but TRC and DaVita reserve the right to
21 change those Pay Practices at any time and for any reason.

22 33. Defendant chooses to establish such Teammate Policies, the Code of Conduct
23 and the DaVita Compliance Program and makes them known to its employees to enhance the
24 employment situation, to secure an orderly, cooperative and loyal work force, and to give its
25 employees the peace of mind associated with job security and the conviction that he or she will
26 be treated fairly.

1 34. Section 4 was intended to create expectations among TRC and DaVita
2 Employees to incentivize those employees to work under conditions that are sometimes
3 unpleasant, sometimes inconvenient, and sometimes dangerous.

4 35. For example, Section 4.5 of the Pay Practices section of the DaVita Teammate
5 Handbook states that

6 OVERTIME

7 Non-exempt teammates (see the Teammate Classifications policy) are paid overtime at
8 one and one half times their regular rate of pay for hours worked in excess of 40 in any
9 workweek. Where state or local wage and hour laws differ from these policies, DaVita
complies with state law to the extent those laws are more beneficial to our teammates.

10 36. Section 4.12 of the Pay Practices Section of the DaVita Teammates Handbook is
11 titled the “Disaster Relief Policy.” The Disaster Relief Policy is a carefully crafted pay scheme
12 designed to encourage and incentivize DaVita Employees within an area affected by a “declared
13 emergency” to appear at work rather than exercise their rights as employment-at-will employees
14 and chose to shelter from the emergency or natural disaster rather than show up for work.

15 37. The “Disaster Relief Policy” is designed for pay continuance during an
16 emergency time frame when a “declared emergency or natural disaster presents teammates from
17 performing their regular duties.”

18 38. A “declared emergency or natural disaster” occurs one of three ways: when said
19 emergency or natural disaster

20 a. “[is] proclaimed by [] the President of the United States;”

21 b. a “state Governor or other elected official; *or*”

22 c. “[by] local [DaVita] leadership.”

23 (Emphasis added.)

24 39. The “PAY PRACTICE FOR NON-EXEMPT TEAMMATES” section of the
25 Disaster Relief Policy at issue here provides: “If a designated facility or business office **is open**
26 during the emergency time frame, teammates who report to their location and **work their**
scheduled hours will be paid premium pay for all hours worked. Unless state law requires

1 otherwise, premium pay will be one-and-one-half (1.5) times the teammate's base rate of pay."
 2 (emphasis added)

3 40. The other provisions of the Disaster Relief Policy relating to situations that the
 4 employees are not able to perform their functions but those provisions do not make the promise
 5 of premium pay for those who do work. They provide:

6 a. The "PAY PRACTICE FOR NON-EXEMPT TEAMMATES" section of
 7 the Disaster Relief Policy provides that if a facility or business office is closed due to a
 8 declared emergency or natural disaster non-exempt employees "will be paid for their
 9 regularly scheduled hours at their base rate of pay during the designated emergency time
 10 frame;"

11 b. If a facility or business office opens late or closes early due to a declared
 12 emergency or natural disaster, employees who show up to work their arrive or leave at
 13 that approved early or late opening or closing time will be paid their hourly rate of pay.

14 c. If a facility or business office is open during the emergency time frame
 15 and employees are unable to make it to work, those employees have to utilize their
 16 "person time off" (PTO) or go unpaid, but if the employee makes it into work, the
 17 employee is paid premium pay.

18 41. "Premium pay" is defined as one and one half times regular pay, unless state law
 19 dictates otherwise.

20 42. In or around 2018, the Disaster Relief Policy was purposefully re-written from a
 21 clearly subjective standard to an ambiguous objective standard.

22 43. Specifically, before in 2017 when the Disaster Relief Plan was first written it
 23 read that "[t]he Disaster Relief Policy provides for pay continuance during an emergency time
 24 frame," Emergency Time Frame was defined as:

25 A declared emergency or natural disaster shall be proclaimed by either the President of
 26 the United States, a state Governor or other elected official, ***and if local leadership
 (DVP/Palmer) deems it appropriate.*** (Emphasis added.)

1 44. After January 1, 2018, the Disaster Relief Policy was changed to an objective
2 standard and now reads:

3 A declared emergency or natural disaster shall be proclaimed by either the President of
4 the United States, a state Governor or other elected official, ***or if local leadership***
(DVP/Palmer) deems it appropriate. (Emphasis added.)

5 45. As objective standard was thought necessary to motivate employees to strive to
6 get to work under the extraordinary circumstances of a declared emergency or natural disaster
7 and, like working overtime, TRC and DaVita wanted its employees to know if they showed up
8 for work in a declared natural disaster or emergency, they would receive premium pay.

9 46. Thus, after January 1, 2018, once a natural disaster or emergency was declared in
10 was the task of local leadership and the Disaster Governance Counsel to “identify” the business
11 offices and facilities affected by that natural disaster or emergency and the time frame they were
12 affected by the same.

13 47. When the leadership of TRC and DaVita changed the language of the Disaster
14 Relief Policy they could not have known that the worst health care emergency in over 100 years
15 would strike the United States in March of 2020.

16 48. On January 21, the first case of COVID-19 in the United States was confirmed in
17 Snohomish County, Washington. An American citizen had returned from Wuhan, China to the
18 U.S., landing at Seattle–Tacoma International Airport on January 15, 2020.

19 49. On January 31, 2020, the President of the United States declared the COVID-19
20 outbreak to be a public health emergency and set the first quarantines of Americans by the
21 federal government in over 50 years. All flights from China to the U.S. were funneled to one of
22 seven airports, including Seattle, Washington.

23 50. On Feb. 26, 2020, the Centers for Disease Control and Prevention (CDC) reports
24 the first case of person-to-person transmission in the U.S., a Chicago woman who developed
25 symptoms after visiting China.

26 51. On February 28, 2020, a woman in her 50s who had recently returned from
South Korea and who was an employee of the United States Postal Service at its Network

1 Distribution Center facility in Federal Way, King County, tested positive for Covid-19.

2 DaVita's maintains a business office in Washington state located at Federal Way.

3 52. Also, around March 13, 2020, the Defendant began closing parts or all of its
4 business offices and employees began working remotely rather than at their offices.

5 53. Until March 31, 2020 and beyond, the COVID-19 Crisis and the national
6 emergency that it spawned prevented some, but not all DaVita teammates from performing their
7 regular duties.

8 54. During the COVID-19 crisis, thousands of Defendant's nonexempt employees,
9 including the Plaintiff, worked their regularly scheduled hours, even though there was a
10 "declared emergency" rather than utilize PTO time or simply forgo pay and exercise their rights
11 as employment-at-will employees to shelter themselves and their families from the dangers
12 presented by COVID-19.

13 55. Those nonexempt employees then began to request to be paid premium pay per
14 the Disaster Relief Policy.

15 56. When the leadership of TRC and DaVita changed the language of the Disaster
16 Relief Policy they could not have known that the worst health care emergency in over 100 years
17 would struck the United States in March of 2020.

18 57. Even so, the decision was almost immediately made that TRC and DaVita would
19 not pay premium pay to those business office and facilities affected by the COVID-19 crisis,
20 even though all of the TRC and DaVita nonexempt at-will employees who worked their hours
21 objectively qualified for premium pay.

22 58. Defendant never convened a meeting of the "Disaster Governance Counsel" to
23 identify the emergency time frame and offices and facilities affected as required by DaVita's
24 Disaster Relief Policy. Nor did Defendant pay Plaintiff or the thousands of similarly situated
25 employees the premium pay promised for the regularly scheduled hours they worked during the
26 time of the declared emergency.

1 59. The beginning of the emergency time frame in this instance was established by
2 the emergency declaration. The need to identify an end date was mooted by the change to the
3 disaster relief policy that excluded COVID-19 from the policy.

4 60. To the extent that a start date to the emergency time frame had to be identified
5 the Defendant failed to do so in good faith and instead unilaterally and arbitrarily declared that
6 the Disaster Relief Policy did not apply to the COVID-19 Crisis because the Crisis did not
7 prevent any of Defendants employees from performing their regular duties, despite the fact that
8 the premium pay was promised only when hours were actually worked.

9 61. DaVita's position was that the Disaster Relief Policy did not apply because it did
10 not prevent employees from performing their regular functions. If this condition applies to
11 emergency declarations as opposed to natural disasters, it is inconsistent with the specific
12 provision of the Disaster Relief policy that promises premium pay to those nonexempt
13 employees who perform their scheduled hours.

14 62. Additionally, DaVita acknowledges that even if the specific provision of the
15 Disaster Relief policy that promises premium pay to those nonexempt employees who perform
16 their scheduled hours, it does not require that all employees be prevented from working their
17 scheduled hours before the policy applies. There were employees who had their location and
18 work affected by the pandemic, and therefore the condition was satisfied.

19 63. DaVita also arrived at its position by asserting that there had been no emergency
20 time frame declared. DaVita arrived at this interpretation by reading the policy that only
21 requires the emergency time frame to be identified as if it made the action discretionary by
22 substituting a need to declare a time frame rather than identifying as set forth in the policy.

23 64. DaVita owed a duty of good faith in the exercise of its responsibilities set forth
24 in the Teammates policies. DaVita's failure to identify the emergency time frame was not in
25 good faith, nor was its interpretation of the provision as requiring an inability to work when the
26 premium pay was promised for working.

65. On March 31, 2020, DaVita attempted to change the Disaster Relief Policy to exclude the COVID-19 crisis. However, it is believed that DaVita employees were not provided with notice of any change in the Disaster Relief Policy and they were not solicited to acknowledge the policy change via the Star Learning system until September of 2020.

66. Defendant's leadership eventually amended the Disaster Relief Policy by adding the following paragraph:

COVID-19 CRISIS

The Disaster Relief Policy does not apply to the COVID-19 crisis. The Disaster Relief Policy applies only when teammates are unable to perform their regular duties. The policy is effective upon a decision by local leadership and the Disaster Governance Council that a declared emergency or natural disaster prevents our facilities from operating or prevents our teammates from working.

Under the COVID-19 crisis, our teammates are able to work and are essential in either in a supporting role for our health care workers or in actually providing healthcare services to patients.

67. Whether or not Defendant's effort to unilaterally change its pay agreement with its non-exempt employees was effective, Defendant may not retroactively change its pay agreement with its employees after those employees have showed up for work, relying on DaVita's Disaster Relief Policy regarding premium pay. That change may only be made upon reasonable notice, with acceptance, and prospectively.

II. PARTIES

68. Plaintiff, Joseph J. Hesketh, III, is an individual who is a citizen of and resides in, the State of Washington.

69. Defendant Total appears to be a California corporation, although court disclosure filings made on its behalf are conflicting as to its state of incorporation.

70. DaVita is a Delaware Corporation. Both list their principal place of business at the same address in Denver, Colorado.

1 **III. JURISDICTION AND VENUE**

2 71. This Court has jurisdiction over Total and the Defendant Class Members who
3 regularly conduct business in King County, Washington.

4 72. Venue is proper in in King County Superior Court because Total and the
5 Defendant Class Members transact business in King County, Washington.

6 73. The Defendant removed this action contending that this Court has jurisdiction
7 over this action pursuant to the Class Action Fairness Act, 28 U.S.C.A. §1332(d). (ECF 1).

8 74. Venue is proper under 28 U.S.C.A. §1391.

9 **IV. ALLEGATIONS COMMON TO PLAINTIFF AND THE CLASS AGAINST THE**
10 **DEFENDANT AND THE CLASS OF DEFENDANTS.**

11 75. Plaintiff and Class Members (hereinafter collectively “Plaintiff Class Members”)
12 are employed by Total, and DaVita is the umbrella corporation of the captive Defendant Class
13 Members.

14 76. Plaintiff Class Members provided services to DaVita as the umbrella corporation
15 of the captive Defendant Class Members after the national emergency declared on January 31,
16 2020.

17 77. DaVita as the umbrella corporation of the captive Defendant Class Members
18 failed to pay the Plaintiff Class Members premium time as promised in the Teammates Policy
19 handbook.

20 78. The Plaintiff Class Members are entitled to the premium pay for the hours they
21 worked as they were promised.

22 79. The amounts owed to the Plaintiff Class Members are liquidated amounts.

23 **V. CLASS ALLEGATIONS AS TO PLAINTIFF CLASS**

24 80. Plaintiff brings this complaint individually and on behalf of a class of all other
25 persons similarly situated.

26 81. The class is comprised of all non-exempt employees of DaVita as the umbrella
corporation of the captive Defendant Class Members who:

1 a. Worked their regularly scheduled hours for Defendant during from
2 January 31, 2020;

3 b. Were not paid the premium pay equal to one and one half times their base
4 rate, for any work performed after the declaration of emergency on January 31, 2020.

5 82. Based on the number of clinics operated by DaVita as the umbrella corporation
6 of the captive Defendant Class Members in the United States, upon information and belief, the
7 class is so numerous as to make it impracticable to join all members of the class of plaintiffs.
8 On information and belief, the class is comprised of hundreds, if not thousands of individuals.

9 83. There are questions of law and fact which are common to all members of the
10 Plaintiff Class, which questions predominate over any question affecting only individual class
11 members, the principal common issues are:

12 a. whether Plaintiff Class Members are entitled to be paid the premium pay
13 for the hours they worked for the Defendant Class Members since the declaration of an
14 emergency; and

15 b. Whether the Plaintiff Class Members are entitled to prejudgment interest
16 on any amounts they are owed by the Defendant Class Members.

17 84. The only individual questions concern the identification of class members and
18 the computation of the relief to be afforded each class member and can be determined by a
19 ministerial examination of the Defendant Class Members' records.

20 85. Plaintiff's claims are typical of the claims of the Plaintiff Class Members. Upon
21 information and belief, the Defendant Class Members treated all of the Plaintiff Class Members
22 the same by failing to pay premium time since the declaration of an emergency.

23 86. Plaintiff will fairly and adequately protect the interests of all class members in
24 the prosecution of this action. He is similarly situated with, and has suffered similar injuries as,
25 the members of the class he seeks to represent. He feels he has been wronged and wishes to
26 obtain redress of the wrong. To that end, plaintiff has retained counsel experienced in handling

1 class action suits involving claims as set forth in this complaint. Neither the named plaintiff nor
2 his counsel has any interest which might cause them not to vigorously pursue this action.

3 87. The Defendant Class Members have and are acting in a uniform manner with
4 respect to the entire class and on grounds uniformly applicable to the class.

5 88. A class action is superior to other available methods for the fair and efficient
6 adjudication of the controversy.

7 89. The amounts involved on an individual basis make pursuit of individual actions
8 unlikely.

9 90. The concentration of the litigation concerning this matter in this Court is
10 desirable if the court.

11 91. A failure of justice will result from the absence of a class action.

12 92. Plaintiff Class Members were damaged by the conduct complained of, in that
13 they were not paid the amounts owed to them and that the Defendant Class Members promised
14 to pay them.

15 **VI. CLASS ALLEGATIONS AS TO THE DEFENDANTS CLASS.**

16 93. Plaintiff brings this complaint against the Defendant Total individually and on
17 behalf of a class of all others similarly situated. DaVita operates as a single unit (or what it calls
18 a village) for purposes of promises made to employees notwithstanding the creation of separate
19 entities. To the extent there are separate entities operating different locations, each have the
20 same interest as Total and DaVita and ultimately DaVita as the owner of any separate entities is
21 affected by the claims made in this action.

22 94. The Defendant Class is comprised of all entities which are owned or controlled
23 by the DaVita who:

24 a. Has employees who are covered by the Teammates Policies Handbook
25 published by DaVita, Inc.

26 b. The employees worked for the Defendant Class Members on and after
January 31, 2020;

1 c. The Defendant Class Members did not pay premium pay, defined as 1.5
2 times their base rate, for any work performed since the declaration of the emergency.

3 95. Based on the number of clinics operated by the Defendant Class Members in the
4 United States, upon information and belief, the class is so numerous as to make it impracticable
5 to join all members of the class of plaintiffs. On information and belief, the class is comprised
6 of tens if not hundreds of entities.

7 96. DaVita directs and controls the payroll and human resources functions and
8 policies for Total and each putative Defendant class member. Total and all putative defendant
9 class members operate under the same policies and procedures and none of them have any
10 different policies or procedures in place.

11 97. Given that Total and the putative Defendant class members operate under the
12 same policies, procedures and control, there are questions of law and fact which are common to
13 all members of the Defendant Class, which questions predominate over any question affecting
14 only individual Defendant Class Members, the principal common issues are:

15 a. Whether Plaintiff Class Members are entitled to be paid premium time
16 for the hours they worked for the Defendant Class Members since the declaration of an
17 emergency.

18 b. Whether the Plaintiff Class Members are entitled to prejudgment interest
19 on any amounts they are owed by the Defendant Class Members.

20 98. The only individual questions concern the identification of Defendant Class
21 Members and the computation of the relief that the defendant class members may be liable for,
22 and can be determined by a ministerial examination of the Defendant Class Members'
23 electronically stored information that is readily available to Total as a result of its employees
24 access to and use of the same software for Total and all of the putative defendant class
25 members.

26 99. Total's position or defenses to the claims are typical of the position or defenses
of the Defendant Class Members. Upon information and belief, the Defendant Class Members

1 treated all of the Plaintiff Class Members the same by failing to pay premium time since the
2 declaration of an emergency as directed by DaVita.

3 100. Defendant Total will fairly and adequately protect the interests of all class
4 members in the defense of this action. It is similarly situated to DaVita and provides its
5 employees DaVita's company policies as set forth in the Teammates Policies Handbook and all
6 of the Defendant Class Members treat its employees in accordance with its provisions. To that
7 end, Defendant Total is likely to retain counsel experienced in handling class action suits
8 involving claims as set forth in this complaint. Neither Total nor its counsel will have any
9 interest which might cause them not to vigorously defend this action and the interests of the
10 Defendant Class Members.

11 101. The Defendant Class Members have and are acting in a uniform manner with
12 respect to the entire class and on grounds uniformly applicable to the class.

13 102. A class action is superior to other available methods for the fair and efficient
14 adjudication of the controversy.

15 103. The Defendant Class Members can more economically defend the claims rather
16 than defend tens if not hundreds of individual actions.

17 104. The concentration of the litigation concerning this matter in this Court is
18 desirable if the court.

19 105. A failure of justice will result from the absence of a class action.

20 **COUNT I – BREACH OF CONTRACT**

21 106. The Plaintiff incorporates the foregoing paragraphs.

22 107. The Plaintiff Class Members are nonexempt at-will employees of the Defendant
23 Class Members, who entered into a contract with the Defendant Class Members as part of their
24 employment, were offered the Teammate Policies handbook that governed the terms of their
25 compensation during their employment.
26

1 108. The Plaintiff's Class accepted those terms of compensation by accepting
2 employment, working in compliance with the terms and conditions in the Teammate Policies
3 handbook, and continuing to work, including the wages to be paid for their services.

4 109. The contract set forth the rate of pay for the Plaintiff Class Members if they
5 worked and there was an emergency declared.

6 110. The Defendant Class Members have breached their agreements with the Plaintiff
7 Class Members by failing to pay them premium time for their work since the declaration of an
8 emergency.

9 111. The Plaintiff Class Members have fully performed their obligations under the
10 parties' agreement for the payment of wages promised.

11 112. The Plaintiff Class Members have been damaged by the Defendant Class
12 Members breach.

13 113. The Plaintiff Class Members are entitled to damages for the Defendant Class
14 Members breach.

15 114. The Plaintiff Class Members are entitled to prejudgment interest on any
16 liquidated amount of damages.

17 **Wherefore,** Plaintiff and Class Members pray that this court:

- 18 A. Certify this case as a class action with the named Plaintiff as class representative
19 and his attorneys as counsel on behalf of the class described herein;
20 B. Certify a class of Defendants with the named Defendant as the representative of
21 the Defendant Class;
22 C. Order appropriate compensatory damages in an amount to be determined at trial
23 for the Plaintiff and the Class in excess of \$75,000;
24 D. Award attorney's fees and costs if allowed by law;
25 E. Award prejudgment interest on any award; and
26 F. Provide such other or further relief as the Court deems appropriate.

COUNT II – GOOD FAITH AND FAIR DEALING

115. The Plaintiff incorporates the foregoing paragraphs.

116. The Defendant and the Defendant Class Members have breached the implied duty of good faith and fair dealing present in all contracts by refusing to cooperate and perform their obligations to identify the emergency time frame so that employees could receive the benefit of the bargain.

117. The Defendant and the Defendant Class Members offered to pay under their Disaster Relief Policy in the Teammate Policies handbook that every employee received upon employment and annually renewed affirmatively, but they failed to perform their ministerial obligation to identify the emergency time frame so employees would receive the premium pay promised.

118. Thus, the Disaster Pay offer in the Teammates Policies handbook was therefore made in bad faith and performed in bad faith by failing to abide by the offer's objective standard of an emergency declaration, and subjectively refusing to identify the emergency time frame and failing to pay the premium pay promised to the employees.

119. Additionally, Total made no effort to inform employees that they would not identify an emergency time frame as promised.

120. Total obtained the benefits of the employees performing their regular duties based on the promise of premium pay but they were never paid.

121. Total acted in bad faith by making a unilateral change to the Disaster Relief Policy by claiming in bath faith that the policy changed retroactively.

122. Plaintiff and the Plaintiffs Class Members are entitled to compensatory damages as a result of failing to perform in good faith and prejudgment interest since they are liquidated amounts owed.

COUNT III – PROMISSORY ESTOPPEL

123. The Plaintiff incorporates the foregoing paragraphs.

1 124. Defendant induced the Plaintiff Class Members to stay on the job and not seek
2 other employment based on DaVita's corporate culture of "We said. We did" and their Pay
3 Practices promised in the Disaster Relief Policy provisions of the Teammate Policies handbook.

4 125. DaVita asked the Plaintiff Class Members to abide by the Teammate Policies,
5 the Code of Conduct and the DaVita Compliance Program as part of their employment.

6 126. DaVita should have reasonably expected that its promise would cause Plaintiff
7 and the Plaintiff Class members to change their position and comply with the policies and
8 continue employment during an emergency.

9 127. The Plaintiff and the Plaintiff Class Members did change their position and
10 continued to work during an emergency.

11 128. The Plaintiff and the Plaintiff Class Members relied on DaVita's promises and
12 were justified in relying on DaVita's promises.

13 129. It would be unjust to not enforce DaVita's promise to the Plaintiff and the
14 Plaintiff Class Members and any injustice can be avoided only if the promise is enforced.

15 130. The Defendant and the Defendants' Class are estopped from refusing to fulfill
16 their promise to pay the Plaintiff and the Plaintiff Class Members the emergency pay they were
17 promised.

18 131. The Defendant and the Defendants' Class failed to fulfill their promise to pay the
19 Plaintiff and Plaintiff's Class Members premium time for their work since the declaration of an
20 emergency.

21 132. The Plaintiff Class Members have fully performed their obligations under the
22 Teammate Policies, the Code of Conduct and the DaVita Compliance Program agreement for
23 the payment of wages promised.

24 133. The Plaintiff Class Members have been damaged by the Defendant Class
25 Members failure to fulfill their promise.

26 134. The Plaintiff Class Members are entitled to damages for the Defendant Class
Members failure to fulfill their promise.

1 135. The Plaintiff Class Members are entitled to prejudgment interest on any
2 liquidated amount of damages determined to be owed.

3 **Wherefore,** Plaintiff and Class Members pray that this court:

- 4 A. Certify this case as a class action with the named Plaintiff as class representative
5 and his attorneys as counsel on behalf of the class described herein;
6 B. Certify a class of Defendants with the named Defendant as the representative of
7 the Defendant Class;
8 C. Order appropriate compensatory damages in an amount to be determined at trial
9 for the Plaintiff and the Class in excess of \$75,000;
10 D. Award attorney's fees and costs if allowed by law;
11 E. Award prejudgment interest on any award; and
12 F. Provide such other or further relief as the Court deems appropriate.

13 **COUNT IV - UNJUST ENRICHMENT**

14 136. The Plaintiff incorporates the foregoing paragraphs.

15 137. If Plaintiff cannot establish a contract that entitles Plaintiff and the Plaintiff Class
16 Members to the relief sought under Count I, Plaintiff alternatively asserts a claim that the
17 Defendant and the Defendants Class have been unjustly enriched.

18 138. Based on Defendant and the Defendant Class Members' own Teammate Policies,
19 Plaintiff and the Plaintiff Class Members were entitled to be paid premium pay for working
20 during a national emergency.

21 139. Defendant and the Defendant Class Members failed to pay Plaintiff and the
22 Plaintiff Class Members the premium pay they were entitled to and instead retained those
23 monies.

24 140. Defendant and the Defendant Class Members benefited at the expense of the
25 Plaintiff and the Plaintiff Class Members by receiving their dedication and commitment to
26 provide services during a national emergency.

1 141. Defendant and the Defendant Class Members were unjustly enriched by its
2 refusal to pay premium pay.

3 142. Defendant and the Defendant Class Members should be required to disgorge the
4 amounts by which they were unjustly enriched.

5 143. Plaintiff and the Plaintiff Class Members have suffered and are entitled to
6 recover damages along with prejudgment interest.

7 **Wherefore,** Plaintiff and Class Members pray that this court:

- 8 A. Certify this case as a class action with the named Plaintiff as class representative
9 and his attorneys as counsel on behalf of the class described herein;
10 B. Certify a class of Defendants with the named Defendant as the representative of
11 the Defendant Class;
12 C. Order appropriate compensatory damages and disgorgement in an amount to be
13 determined at trial for the Plaintiff and the Class in excess of \$75,000;
14 D. Award attorney's fees and costs if allowed by law;
15 E. Award prejudgment interest on any award; and
16 F. Provide such other or further relief as the Court deems appropriate.

17
18 Respectfully submitted,

19
20 Dated this 12th of May 2021.

21 /s/ Christina L Henry
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